the contract price,[4] although anything amounting to participation in the unlawful act will bar that recovery.[5] By analogy it is believed that, in the third class of cases, the lender should be allowed to recover regardless of notice. In further support of this contention it is to be noted that if the improper purpose of the officers of the corporation should be subsequently abandoned and the funds properly applied, mere knowledge on the part of the lender of the preliminary wrongful intent would surely not be sufficient ground for invalidating the contract. This distinction, therefore, seems one upon which courts may properly seize in permitting a lender with notice of the wrongful purpose of the loan to recover against the corporation.[6]

RECENT CASES.

ADMISSIONS — ADMISSIONS BY CONDUCT — PAYMENT INTO COURT. — In an action of tort for personal injuries, the defendant pleaded a general denial and paid money into court. *Held*, that the cause of action is conclusively admitted, leaving only the question of damages to be tried. *Wells* v. *Missouri Edison Co.*, 84 S. W. Rep. 204 (Mo., St. Louis Ct. App.). See NOTES, p. 460.

BANKRUPTCY — PROVABLE CLAIMS — PART PAYMENT FOR BREACH OF TRUST BY CO-TRUSTEE. — By a compromise effected with one of two co-trustees who were jointly and severally liable for a breach of trust, the *cestui que trust* received a part of the sum found to be due. The other co-trustee was insolvent. *Held*, that the *cestui* may prove against the insolvent estate the full amount of the damages sustained by the breach of trust without deducting the sum already received. *Edwards* v. *Hood-Barrs*, 21 T. L. R. 89 (Eng., Ch. D.).

As the party injured may bring separate actions against each of several joint tortfeasors, so may a *cestui que trust* prove his claim for a breach of trust against the insolvent estate of each of his co-trustees. *Ex parte Poulson*, DeG. 79. But a claim against any one of several joint tortfeasors is satisfied in England by a judgment against any of the others, and in the United States by a satisfaction of such judgment. *Brinsmead* v. *Harrison*, L. R. 7 C. P. 547; *Lovejoy* v. *Murray*, 3 Wall. (U. S.) 1. It follows that where a compromise secures part satisfaction from one of those liable, the claim against the other parties should be correspondingly reduced. *Ellis* v. *Esson*, 50 Wis. 138. Where the other parties are insolvent the rule should apparently hold as to claims against their estates. *Cf. In re Pulsifer*, 14 Fed. Rep. 247. The point is, however, said to be new in England, and does not seem to have been directly adjudicated in this country. Nor is assistance to be obtained from the cases where after part payment by a surety the creditor has still been permitted to prove for his whole debt; for the total amount provable remains in such cases unchanged, the only question being as to those entitled to prove it. See 16 HARV. L. REV. 139.

BILLS AND NOTES — CHECKS — EFFECT OF DUPLICATE CHECK. — The defendant, the payee of a check, indorsed it to the plaintiff, who lost it. Nearly seven months later the plaintiff obtained a duplicate from the drawer which the defendant indorsed but which the drawee refused to pay for lack of funds. *Held*, that the payee's indorsement of the duplicate is only an acknowledgment of his original liability from which the plaintiff's laches has already discharged him. *Lewis* v. *Commercial National Bank*, 83 S. W. Rep. 423 (Tex., Civ. App.).

The plaintiff's laches constituted a good defense to the liability of the defendant on the original check, since the loss of it did not dispense with a regular presentment for payment. *Thackray* v. *Blackett*, 3 Camp. N. P. 164. And the indorsement of the duplicate check by the payee charged him with no new liability to the plaintiff. See *Benton* v.

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[4] Cheney *v.* Duke, 10 Gill & J. (Md.) 11; Hodgson *v.* Temple, 5 Taunt. 181.

[5] Wheeler *v.* Russell, 17 Mass. 258.

[6] Wright *v.* Hughes, 119 Ind. 324; Bradley *v.* Ballard, 55 Ill. 413; *In re* Contract Corporation, L. R. 8 Eq. 14.

Martin, 40 N. Y. 345. But the defense of laches on the original obligation may be waived by an admission of liability or a promise to pay after notice of the facts constituting a release. *Thornton* v. *Wynn*, 25 U. S. 183. The indorsement of the duplicate, while creating no new liability, might, under some circumstances, be conclusive evidence of a waiver of the plaintiff's laches. See *Bank of Gilby* v. *Farnsworth*, 38 L. R. A. 843 (N. Dak.). But in this, as in most cases, the fairer inference seems to be that the indorsee was intended to be given only the rights which he might, at that time, have had on the original instrument.

BILLS OF LADING — ACCEPTANCE — FAILURE OF SHIPPER TO READ TERMS. — The plaintiff entered into a written contract for the transportation of goods by the defendant to a point beyond its line, by which the defendant assumed responsibility for the carriage of the goods by the line to which it was to deliver them. The goods were shipped and afterwards a bill of lading was issued containing a stipulation that the defendant would not be liable beyond its own line. The plaintiff hypothecated the bill of lading without reading it. *Held*, that the original contract controls. *Northern Pacific Ry. Co.* v. *American Trading Co.*, 25 Sup. Ct. Rep. 84.

Generally, in the absence of fraud, acceptance of a bill of lading by a shipper makes it the contract of carriage according to its terms, whether the shipper has read them or not, and notwithstanding that they are inconsistent with a prior oral agreement. *Germania Fire Insurance Co.* v. *Memphis, etc., R. R. Co.*, 72 N. Y. 90; *Grace* v. *Adams*, 100 Mass. 505. The custom of carriers to issue bills of lading containing limitations is so general that every person dealing with them may be fairly charged with a duty to read the bill, and with knowledge of its contents and assent thereto if he fails to read. It would seem that business custom would charge one with this implied assent as much when the previous contract was written as when oral, and that the fact that the goods had gone forward before the issuance of the bill would not affect this assent. *Contra*, *Bostwick* v. *Baltimore, etc., R. R. Co.*, 45 N. Y. 712. On this reasoning the result of the principal case appears questionable. But, though the point was not considered by the court, the defendant apparently gave no consideration for the inconsistent terms of the bill, and the case might have been rested on that ground.

CONFLICT OF LAWS — BANKRUPTCY AND INSOLVENCY — WHETHER STATE LAW GOVERNS ADMISSIBILITY OF CLAIM IN BANKRUPTCY COURT. — Under a statute regulating the rights of married women the state courts had held that a claim by a married woman for money loaned to her husband from her separate estate was not enforceable either in law or in equity. The plaintiff, a married woman, sought to prove in a court of bankruptcy a claim for money loaned from her separate estate to an insolvent firm of which her husband was a partner. *Held*, that the claim is allowable. *James* v. *Gray*, 131 Fed. Rep. 401 (C. C. A., First Circ.).

The federal courts sitting in the different states regularly seek to follow the rules of law which prevail in those states. *Detroit* v. *Osborne*, 135 U. S. 492. Their jurisdiction in equity, however, is said to allow them to administer an equity of their own, independent of the rules prevailing in the various states. *Neves* v. *Scott*, 13 How. (U. S.) 268. Under this doctrine, the claim in the principal case being merely equitable, the court of bankruptcy, sitting with equitable powers, felt that it could decide whether it was valid or not without regard to the previous state decisions. This view may be further reinforced by the theory that, since the federal courts have a concurrent jurisdiction with the courts of the state, they are in no way bound to follow the decisions of the latter. *Cf. Swift* v. *Tyson*, 16 Pet. (U. S.) 1. Upon the weight of authority, however, it would seem that both in law and in equity the substantive rights of parties under contracts made within the state should be controlled by the construction placed by the state courts upon the statutes regulating such contracts. *Missouri, etc., Co.* v. *Kruming*, 172 U. S. 351; *Lloyd* v. *Fulton*, 91 U. S. 479.

CONFLICT OF LAWS — LIABILITY OF STOCKHOLDERS — WHAT LAW GOVERNS. — By its articles of incorporation an English limited company was empowered to appoint an agent to do all such acts as might be necessary to comply with the law of any country where it might carry on business. It transacted business in California, where each stockholder of a corporation was, by statute, individually liable for its debts. The plaintiff sued the defendant, a stockholder, in England for a debt contracted by the company in California. *Held*, that the plaintiff cannot recover. *Risdon Iron and Locomotive Works* v. *Furness*, 21 T. L. R. 179 (Eng., K. B. D.). See NOTES, p. 452.

CONSTITUTIONAL LAW — CLASS LEGISLATION — ACT ALLOWING PRIVATE CLAIM AGAINST STATE. — The Constitution of New York provided that the legislature should not "allow any private claim against the state." Const. (1874) Art. III, § 19. The state conveyed land to the plaintiff for value by letters patent which should "in

no case operate as a warranty of title." The title proving invalid, a special enactment conferred jurisdiction on the Court of Claims to determine the plaintiff's claim for damages and to enter judgment therefor. *Held*, that although the enactment authorizes a judgment for the plaintiff despite the lack of warranty, it does not violate the constitution. Two justices dissented. *Wheeler* v. *State of New York*, 97 N. Y. App. Div. 276.

The New York courts have upheld special enactments authorizing the Court of Claims, in actions for labor and materials furnished the state, to disallow the defense of lack of authority on the part of the officials who contracted. *American Bank Note Co.* v. *State of New York*, 64 N. Y. App. Div. 223. Obviously, the legislature, having power to authorize officials to execute certain contracts, has power to ratify the acts of officials in executing such contracts in excess of their authority. *O'Hara* v. *State of New York*, 112 N. Y. 146. The aim of the act in the principal case differed materially. The letters patent expressly excluded any warranty, which, furthermore, could not be implied in New York. 3 R. S., 2d ed., 2638, § 216; *Burwell* v. *Jackson*, 9 N. Y. 541. The statute as construed purports, not merely to waive a technical defense to an otherwise valid, existing obligation, but to allow a private claim against the state where none before existed. The same court upon substantially the same facts construed an enactment directing an award of "such damages as shall be just and equitable," as not waiving the defense of lack of warranty. *Killam* v. *State of New York*, 64 N. Y. App. Div. 243. But if the construction of the present statute be supported, the result, though perhaps desirable, seems difficult to reconcile with technical principles.

CONSTITUTIONAL LAW — DUE PROCESS OF LAW — STATUTE AUTHORIZING SUBPŒNA TO COMPEL CITIZEN OF ONE STATE TO TESTIFY IN ANOTHER. — A New York statute authorized the granting of a subpœna to compel a resident of that state to appear as a witness in a criminal prosecution pending in Pennsylvania. *Held*, that the statute is unconstitutional, as depriving a person of his liberty without due process of law. *In re Commonwealth of Pennsylvania*, 90 N. Y. Supp. 808.

Although the phrase, "due process of law," as contained in the Fourteenth Amendment cannot be defined with exactness, it may be said in general that this amendment forbids any novel procedure depriving a person of his life, liberty, or property without due notice and an opportunity of being heard in his own defense. See *Holden* v. *Hardy*, 169 U. S. 366, 389. In the present case, as the court points out, the obvious result of the statute would be to deprive a person of his liberty without a hearing, and, in effect, to banish him temporarily from the state. As this procedure is novel, it cannot be supported as sanctioned by the common law prior to the adoption of the amendment. Furthermore, since the statute was not passed in the interest of the people of New York, it cannot be regarded as an exercise of the police power, which was in no way restricted by the Fourteenth Amendment. *Cf. Lake Shore, etc., Ry. Co.* v. *Ohio*, 173 U. S. 285; *Barbier* v. *Connolly*, 113 U. S. 27. It would therefore seem clear that the statute was unconstitutional.

CONTRACTS — DEFENSES: FRAUD — VALIDITY OF FRAUDULENTLY OBTAINED CONTRACT PURPORTING TO WAIVE DEFENSE OF FRAUD. — A written contract between the plaintiff and the defendant recited that it was made under the representations therein expressed and no others. To a suit thereon, the defendant pleaded fraudulent parol misrepresentations. *Held*, that the defendant is estopped to set up this defense. *Equitable Mfg. Co.* v. *Biggers*, 49 S. E. Rep. 271 (Ga.).

It is a general rule of law that simple contracts, even though written, are voidable, if obtained by material misrepresentations of present facts, whether such misrepresentations be embodied in the contracts themselves or be oral and *dehors*. *Newman* v. *Smith*, 77 Cal. 22. The present case cannot be taken out of the rule on the ground of estoppel; for the recital in the contract could not have altered the plaintiff's belief as to any representations which he may himself have made: nor can the conclusion of the court be sustained on the ground that there was a binding agreement to waive the defense of fraud; for the very waiver being part of the fraudulently obtained contract, was itself obtained by fraud and invalid. *Universal Fashion Co.* v. *Skinner*, 71 Hun (N. Y.) 293; *Bridger* v. *Goldsmith*, 143 N. Y. 424. There is a tendency to hold that insurance policies may, by their own stipulations, be incontestible for fraud after a lapse of time. *Wright* v. *Mutual, etc., Ass'n of America*, 118 N. Y. 237. Still the incontestible clause cases are neither unanimous in result nor consistent in reasoning, and furnish company rather than an excuse for the decision in the principal case. *Cf. Welch* v. *Union, etc., Co.*, 108 Ia. 224.

CONTRACTS — OPTIONS — RIGHTS OF ASSIGNEE OF OPTION TO PURCHASE LAND. *Held*, that an assignee of an option to purchase land will not be given specific performance. *Rease* v. *Kittle*, 49 S. E. Rep. 150 (W. Va.). See NOTES, p. 457.

CORPORATIONS — STOCKHOLDERS — INDIVIDUAL LIABILITY OF TRANSFERRER OF STOCK OF INSOLVENT BANK. — *Held*, that a stockholder of an insolvent national bank is discharged from individual liability to creditors of the bank if he has transferred his shares to a person able to perform the obligations thereby cast upon him. *McDonald* v. *Dewey*, 37 Chi. Leg. N. 174 (U. S., C. C. A., Seventh Circ. Oct. Term, 1904). See NOTES, p. 455.

CORPORATIONS — ULTRA VIRES — EFFECT OF IMPROPER EXERCISE OF BORROWING POWER. — A corporation, having general power to borrow money for the purposes of its business, exercised that power for another purpose. *Held*, that, in the absence of notice by the lender of the improper purpose of the transaction, the misapplication of the money does not invalidate the loan. *In re David Payne & Co., Limited*, [1904] 2 Ch. 608. See NOTES, p. 463.

CORPORATIONS — ULTRA VIRES — EFFECT OF ULTRA VIRES TRANSACTIONS. — The defendant, a national bank, purchased stock in another bank and received dividends thereon. *Held*, that since the purchase was *ultra vires*, the defendant is not liable for an assessment levied by the comptroller of the currency. *Shaw* v. *National, etc., Bank*, 132 Fed. Rep. 658 (C. C. A., Eighth Circ.).

A Missouri corporation, in excess of its charter powers, purchased stock in a Kansas corporation. *Semble*, that the transfer of stock to the Missouri corporation is void. *Anglo-American, etc., Co.* v. *Lombard*, 132 Fed. Rep. 721 (C. C. A., Eighth Circ.). See NOTES, p. 461.

CRIMINAL LAW — ESTOPPEL — PRISONER ESTOPPED TO DENY LEGALITY OF HIS ACTS. — The prisoner, a county officer, being indicted for misfeasance in office, pleaded that as the grand jury had been selected from an irregular jury list, its acts were void. As such officer, he had himself selected this list and sworn to its legality. *Held*, that he is estopped to deny the legality of the grand jury. *State ex rel. Clark* v. *Second Judicial District Court*, 78 Pac. Rep. 769 (Mont.).

It has been held that if a person makes away with money which he has received upon his false representation that he is the agent of another and that he accepts the money for his alleged principal, he may be punished for the crime of embezzlement. *State* v. *Spaulding*, 24 Kan. 1; *contra*, *Moore* v. *State*, 53 Neb. 831. As in the present case, this result is reached on the ground that the prisoner is estopped to deny what he represented to be true. This reasoning can hardly be supported. The state should punish a person only for doing it an injury, and should conduct the trial in a legal and regular manner. Hence the false representation of a person which, if true, would result in his criminal liability, or his false statement that a certain procedure is legal, should not form the basis for the infliction of punishment; for, in the first instance, the injury for which he is being punished has not really been done, and in the second he is not in fact being legally tried. *Cf.* 12 HARV. L. REV. 56.

CRIMINAL LAW — STATUTORY OFFENSES — INTERPRETATION OF STATUTE PENALIZING SALE OF OLEOMARGARINE. — A statute made it a penal offense to sell oleomargarine containing coloring matter. Under a law requiring all persons who offered oleomargarine for sale to sell to any person presenting the purchase price a sample for purposes of analysis, a state inspector purchased some of the defendant's oleomargarine, which was found to contain coloring matter. *Held*, that the defendant may be convicted of the statutory offense. *State* v. *Rippeth*, 71 Oh. St. 326.

The effect of this decision is to punish the defendant for doing what he was legally bound to do. In view of the harshness of this result, it might be argued that the legislature meant to exclude sales to inspectors from the operation of the act. On the other hand, there are strong reasons for the present literal construction. Generally, courts are inclined to be strict in their interpretation of statutes concerning the sale of adulterated or injurious foods. Thus a criminal intent is an unnecessary element in the crime. *Commonwealth* v. *Farren*, 9 Allen (Mass.) 489. The fact that the article was not to be used for human consumption is held immaterial. *Cf. Commonwealth* v. *Raymond*, 97 Mass. 567; *contra*, *Schmidt* v. *State*, 78 Ind. 41. Broadly speaking, the tendency of legislation is to prevent all dealings with colored oleomargarine; and as the present statute, which is very comprehensive in its scope, reflects the same temper, the court may be supported in giving the fullest possible effect to its terms. *Cf.* Ann. Code Ia. (1897) § 2516.

ELECTIONS — EFFECT OF IMPROPER EMBLEM ON VALIDITY OF BALLOTS. — A statute made it a penal offense to circulate, for election purposes, ballots bearing the chosen emblem but not the names of all the candidates of a political party. One party furnished ballots bearing an emblem which was very similar to that of another but

which did not deceive the voters who cast them. *Held*, that as the statute is directory only, the ballots are not invalid. *Esquibel* v. *Chaves*, 78 Pac. Rep. 505 (N. Mex.).

Statutes regulating the preparation and canvassing of ballots are generally construed as merely directory, even though they make the violation of their provisions criminal. Consequently ballots which do not exactly comply with such provisions and are technically irregular, are not rejected, if such irregularities have not affected the result of the election by misleading voters. *Blankinship* v. *Israel*, 132 Ill. 514; *Kellogg* v. *Hickman*, 12 Col. 256. If the statutes provide that such irregularities shall render ballots void, they are obviously mandatory and the ballots cannot be counted, however clear the intention of the voters. *Kearns* v. *Edwards*, 28 Atl. Rep. 723 (N. J.). And if the enactment prescribes the manner in which voters shall mark or stamp ballots, it is generally held mandatory, though without express provision that ballots not complying therewith shall be void. *In re Flynn*, 181 Pa. St. 457; *Murphy* v. *San Luis Obispo*, 119 Cal. 624. There is apparently no inconsistency in these propositions. Where such statutes are not expressly mandatory, it may well be the intention of legislatures that the voter be held to full knowledge of the law and required to express his intention in the legally competent manner; but not that he be disenfranchised by the irregularities of others over whom he has no control.

ESTOPPEL — ESTOPPEL IN PAIS — FAILURE TO ACT. — The plaintiff bank placed money to the credit of a depositor on the security of warehouse receipts purporting to have been issued by the defendant. The plaintiff notified the defendant of this loan by letter, but the defendant, though it knew that the receipts were forgeries, made no reply until after the depositor had withdrawn the amount of his account and failed. *Held*, that the defendant is liable by estoppel for that loss which it might have saved the plaintiff, if it had answered the letter promptly. *Commercial National Bank* v. *Nacogdoches, etc., Co.*, 133 Fed. Rep. 501 (C. C. A., Fifth Circ.). For a discussion of the principles involved, see 18 HARV. L. REV. 140.

EVIDENCE — CHARACTER — VICIOUS CHARACTER OF DECEASED TO PROVE VICIOUS ACT. — The defendant in a homicide case testified that, a short time before the killing, he had seen the deceased in adultery with the defendant's wife, daughter of the deceased. *Held*, that in determining the degree of the murder, evidence of the deceased's character is admissible, as tending to show that he was guilty of the act alleged. *Orange* v. *State*, 83 S. W. Rep. 385 (Tex., Cr. App.). See NOTES, p. 459.

EVIDENCE — EVIDENCE OF HANDWRITING — TESTING WITNESS BY WRITINGS ONLY PARTIALLY DISCLOSED. — In an action upon a promissory note, after denying the genuineness of the maker's signature, a non-expert witness was shown documents, apparently already in evidence, so covered as to leave visible only the signatures, and was asked whether the latter were genuine. *Held*, that the witness is not entitled to see the entire document before expressing an opinion. *Groff* v. *Groff*, 209 Pa. St. 603.

A witness to handwriting, whether expert or not, may on cross-examination be tested by writings which are properly in evidence or are admitted by the parties or the witness to be genuine. Whether he may be questioned as to writings not already in evidence is in conflict. Where the handwriting of an instrument is disputed, it has been held not error to require an expert to be shown the entire document. *West* v. *State*, 22 N. J. Law 212, 240. The opposite result has been reached in the case of expert or non-expert witnesses examined as to signatures. *Brown* v. *Woodward*, 75 Conn. 261; *Hoag* v. *Wright*, 174 N. Y. 36; *contra*, *Insurance Co.* v. *Throop*, 22 Mich. 146. If the signature only is disputed and the witness's knowledge is not limited to the alleged author's signature on a particular class of documents, the practice employed in the principal case seems unobjectionable. Generally, the question should rest with the discretion of the trial judge. It should be noticed that the decision of the precise question under discussion should not vary whether or not the court is one of those which allow witnesses to be tested by documents extrinsic to the issue.

FEDERAL COURTS — JURISDICTION BASED ON DIVERSITY OF CITIZENSHIP — JURISDICTION IN EMINENT DOMAIN PROCEEDINGS. — A proceeding for the taking of land by eminent domain was begun in a state court by a domestic corporation against a corporation of a different state *Held*, that the case may be removed to the federal court upon petition by the foreign corporation. Fuller, C. J., and Holmes, Brewer, and Peckham, JJ., dissented. *Madisonville Traction Co.* v. *Saint Bernard Mining Co.*, 25 Sup. Ct. Rep. 251.

In accordance with a literal interpretation of the Constitution and the Judiciary Act of 1887–8, the majority of the court, following an earlier case, holds that this is a controversy between citizens of different states and therefore removable to the circuit court. *Cf. Searl* v. *School District No. 2*, 124 U. S. 197. On the other hand, it is

argued by the minority that this, though in form a controversy between citizens, is in substance an exercise by the state of its sovereign right of eminent domain with which the United States cannot interfere. See *Boom Co.* v. *Patterson*, 98 U. S. 403, 406. That the form of the controversy is not always conclusive, is shown by the case suggested in the dissenting opinion, where the jurisdiction of the United States courts is denied in suits by citizens of one state against officers of another, if the action is in effect against the state. *Smith* v. *Reeves*, 178 U. S. 436. While the reasoning of the minority might well have led the court to reach the opposite result if the question had been *res nova*, yet the decision may be logically supported without departing from the letter of the Constitution or the statute, and should therefore be regarded as settling the law.

FRAUDULENT CONVEYANCES — RIGHTS OF CREDITORS — CONVEYANCE BY HUSBAND TO WIFE IN PERFORMANCE OF CONTRACT. — A wife conveyed land to her husband, for use in business, upon an unrecorded written agreement to reconvey when he went out of business. When he decided to do this, some years later, he executed and put on record a deed of the land to his wife, but was at the time insolvent. *Held*, that his trustee in bankruptcy may avoid the conveyance. *Lavender* v. *Bowen*, 101 N. W. Rep. 760 (Ia.).

Under the National Bankruptcy Act, §§ 67 e, 70 e, the trustee can avoid any transfer made by the bankrupt which any creditor might have avoided under the laws of the state in which the property transferred is situated. Though the mere acceptance by a husband of property from his wife does not imply an obligation to reconvey as against his creditors, a promise to repay given in exchange for the transfer will support a subsequent conveyance. *Steadman* v. *Wilbur*, 7 R. I. 481. The simple fact that creditors have advanced money in reliance upon the husband's title to such property does not enable them, by estoppel or otherwise, to avoid a retransfer to the wife. *Payne* v. *Wilson*, 76 Ia. 377. The burden of proving a valid consideration for the conveyance rests upon the wife, but by the better view the burden of proving fraud is upon the creditor who asserts it. *Evans* v. *Rugee*, 57 Wis. 623. The law of Iowa has heretofore seemed to accord with these principles. *Garr, Scott & Co.* v. *Klein*, 93 Ia. 313; *Neighbor* v. *Hoblitcel*, 84 Ia. 598. And the facts reported in the present case seem hardly sufficient to create an estoppel or support an inference of fraud. In fact, they appear even to disclose a trust. *Cf. Brisco* v. *Norris*, 112 N. C. 671.

GAME — NATURE OF LANDOWNER'S RIGHT TO SHOOT ON HIS OWN LAND. — *Held*, that an Arkansas statute forbidding non-residents to shoot and fish in the state violates the Fourteenth Amendment in that it deprives non-residents owning land within the state of a property right which resident owners enjoy. *State* v. *Mallory*, 83 S. W. Rep. 955 (Ark.). See NOTES, p. 458.

INSURANCE — INSURANCE AGENTS — AGENT ACTING IN BEHALF OF INSURED TO FILL OUT APPLICATION. — A contract of insurance provided that the person soliciting or taking the application should be the agent of the insured as to all statements and answers made therein. *Held*, that the solicitor does not become the agent of the insured. *Reilly* v. *Empire Life Insurance Co.*, 90 N. Y. Supp. 866.

In an earlier New York case it was held that a medical examiner was the agent of the insurance company notwithstanding a stipulation to the contrary. See 15 HARV. L. REV. 859. The present decision extends the rule to the case of soliciting agents.

INTERSTATE COMMERCE — WHAT CONSTITUTES — AGREEMENT BY BEEF DEALERS IN RESTRAINT OF INTERSTATE TRADE. — A number of dealers controlling sixty per cent of the commerce in fresh meats in the United States, entered into an agreement restraining their bidding against each other for live stock, much of which was sent from other states than that in which the bidding was done. They further agreed to regulate among themselves the prices of meat to be sold in other states, and the charges for its cartage and delivery, and made arrangements with common carriers for unfair discrimination in rates. To a bill for an injunction filed on behalf of the federal government, the defendants demurred. *Held*, that the injunction should be granted. *Swift & Co.* v. *United States*, 25 Sup. Ct. Rep. 276.

For a discussion of the principles involved, see 16 HARV. L. REV. 522.

JUDGMENTS — ESSENTIALS TO VALIDITY — DEFAULT FOR FAILURE TO ANSWER. The code of Montana provided that if no answer were filed to a complaint within the time specified by the summons or such further time as should be granted, the default of the party should be entered. A defendant moved to quash the service of summons as insufficient. Before the motion came to be argued the twenty days specified in the summons expired and a default was entered. The motion was afterwards

denied and the defendant claimed a right to plead to the merits. *Held*, that the judgment by default stands. *Mantle* v. *Casey*, 78 Pac. Rep. 591 (Mont.).

In courts governed by codes similar to that of Montana a demurrer has been held to be such answer as complies with the provision and prevents default. *Oliphant* v. *Whitney*, 34 Cal. 25. But it has also been held, in line with the present case, that a motion of this sort, concerning matters preliminary or collateral to the issue, is not such answer. *Higley* v. *Pollock*, 21 Nev. 198. There is little or no authority for the opposite view. See *Lyman* v. *Bechtel*, 55 Ia. 437. A general appearance seems to be required, except in states which, like Colorado, expressly name a motion as sufficient to prevent default. It might be said that in the principal case the defendant should have asked for an extension of the time for answering. But a dissenting justice argues that such a request would amount to a general appearance and an admission of the jurisdiction which the defendant denies. Cf. *Yale* v. *Edgerton*, 11 Minn. 271; *contra*, *Powers* v. *Braly*, 75 Cal. 237. Where this is so the use of a motion to quash is rendered hazardous unless the defendant is sure of his ground or can secure an immediate hearing. The result, however, is perhaps satisfactory so far as it discourages technical and dilatory motions.

MARSHALING ASSETS AND SECURITIES — FORECLOSURE OF MORTGAGES — EQUAL EQUITIES. — Part of property subject to three mortgages was taken for a railroad. Pending a suit for compensation, which was to be subject to the mortgages, the third mortgagee was cut out of the remaining land by foreclosure of the second mortgage. He then sought to marshal the first mortgage against the remaining land in favor of the compensation fund. *Held*, that the first mortgage is to be paid ratably from the land and the compensation money. *Bates* v. *Boston Elevated R. Co.*, 72 N. E. Rep. 1017 (Mass.). See NOTES, p. 453.

MUNICIPAL CORPORATIONS — LIABILITY FOR TORTS — CONDITION OF STREETS. — A city authorized an excavation under a public sidewalk, and the construction of a temporary bridge over the opening. Under the weight of a crowd, the bridge gave way. *Held*, in an action for the death of a person injured thereby, that there is no evidence to support a verdict against the city, but that it is a question for the jury whether the contractors who built the bridge were negligent in its construction. *Coolidge* v. *City of New York*, 90 N. Y. Supp. 1078.

A city is under a duty to keep its streets in reasonably safe condition. While not an insurer, it must use due care, and this duty of care cannot be delegated. *Village of Jefferson* v. *Chapman*, 127 Ill. 438. Hence the city is liable for injuries due to the dangerous condition of highways obstructed by city works, though the danger is caused by the negligence of independent contractors. *Storrs* v. *City of Utica*, 17 N. Y. 104; *City Council* v. *Cone*, 91 Ga. 714. It is not liable for their negligence when it does not affect the condition of the way. *Herrington* v. *Village of Lansingburgh*, 110 N. Y. 145. This duty being the basis of liability, the same reasoning applies where work is done in a street, for private persons under the city's license. *Hayes* v. *West Bay City*, 91 Mich. 418. In the principal case, since the city had notice that a dangerous opening had been made, a finding that the opening was negligently protected, no matter who was charged with the immediate duty of making the bridge safe, seems as conclusive against the city as against the contractor.

PLEADING — DEFENSE OF PURCHASE FOR VALUE. — After conveying land to the plaintiff the grantor mortgaged it to the defendant, whose deed was recorded before that of the plaintiff. *Held*, on a bill to quiet title, that the burden is on the plaintiff to prove that the defendant is not a *bona fide* purchaser. *Sheldon* v. *Powell*, 78 Pac. Rep. 491 (Mont.).

The principles governing the pleading of a *bona fide* purchase vary according to the substantive rights involved. In the first class are cases analogous to those in which a trustee transfers the trust property. The *cestui's* equitable right is thereby extinguished. See 18 HARV. L. REV. 53. To make out a new right against the purchaser he must prove bad faith. *McNeil* v. *Magee*, 5 Mas. (U. S.) 244. Second, in cases like actions by a land-owner to recover his title-deeds, since title-deeds follow the land, equity will grant relief, unless the holder defend by proving that he is an innocent purchaser. *Wallwyn* v. *Lee*, 9 Ves. Jun. 24. Finally, in actions like the present, where the defendant records his title without notice of a prior unrecorded deed to the plaintiff, in jurisdictions where the person recording acquires title, the plaintiff must proceed in equity and charge the defendant's conscience by proving notice. *McNeil* v. *Magee*, *supra*; *of. Phifer* v. *Barnhart*, 88 N. C. 333. If however, by statute, one recording with notice get no title, the plaintiff must bring ejectment, and, to prove his right of entry, show that the defendant, because of bad faith, acquired no title. *Anthony* v. *Wheeler*, 130 Ill. 128.

POLICE POWER — REGULATION OF BUSINESS AND OCCUPATIONS — HORSESHOERS REQUIRED TO PASS EXAMINATION. — A statute was enacted providing for the examination and registration of horseshoers in certain cities. *Held*, that the statute is unconstitutional as an illegitimate exercise of the police power. *In re Aubrey*, 78 Pac. Rep. 900 (Wash.).

This seems to be a sound application of the principles which determine the limitations of the police power in regulating occupations. For a discussion of these principles in connection with a case holding a requirement of examinations for plumbers constitutional, see 17 HARV. L. REV. 356.

PRESUMPTIONS — DEATH AFTER SEVEN YEARS — DECLARATIONS AGAINST INTEREST. — *Held*, that an absconding solicitor, although he may have remained absent to avoid the ordeal of public bankruptcy, is presumed to be dead when he has not been heard of for seven years, and his entries of collections are admissible in evidence as declarations against interest. *Wills* v. *Palmer*, 53 W. R. 169 (Eng., Ch. D.).

By the common law, in the absence of proof of death, life is presumed to continue. From ancient statutes, relating to bigamy and life estates, has been adopted the counter-presumption of death after seven years' absence without intelligence. *Cf. Burr* v. *Sim*, 4 Whart. (Pa.) 150, 170. But the rule is practically uniform that such presumption arises only when no news has been received by persons likely to hear from the absentee; and is rebutted by circumstances fairly explaining his silence consistently with life. *Bowden* v. *Henderson*, 2 Sm. & G. 360. In the light of these authorities this decision seems ill-considered, but cases are infrequent which apply the presumption merely to render evidence admissible, and that situation may require a less exacting rule than where property interests are directly involved. *Cf. Manby* v. *Curtis*, 1 Price 225, 229. The court thus circumvents the prevailing doctrine that declarations against interest are admissible only after the declarant's death. *Stephen* v. *Gwenap*, 1 Moo. & R. 120; see *contra*, *Shearman* v. *Atkins*, 4 Pick. (Mass.) 283, 293. It would seem more logical to apply the presumption of death uniformly, and either reject the evidence entirely, or, on analogy with similar cases, extend the doctrine admitting such declarations to include those of absentees. *Cf. North Bank* v. *Abbot*, 13 Pick. (Mass.) 465, 471.

QUIETING TITLE — BILL TO REMOVE VENDOR'S LIEN WHEN CLAIM FOR PURCHASE PRICE IS BARRED BY LIMITATIONS. — The plaintiff purchased land from the defendant, who retained a vendor's lien as security for the purchase-money note. Both the lien and the note being barred by the statute of limitations, the plaintiff filed a bill to have the lien removed as a cloud upon his title. *Held*, that the bill can be granted only on condition that the plaintiff pay for the land. *Cassell* v. *Lowry*, 72 N. E. Rep. 640 (Ind., Sup. Ct.).

It is true that equity will not as a rule allow a title otherwise unimpeachable to be clouded by a claim which can never be successfully enforced, since such a claim can result only in oppression and useless reduction of value. *Steam, etc., Co.* v. *Jones*, 21 Blatchf. (U. S.) 138. Accordingly a disseisor who has acquired land by adverse possession for the statutory period is entitled to a decree of a court of equity making his title perfect of record. *Arrington* v. *Liscom*, 34 Cal. 365. The fact that in Indiana the running of the statute of limitations against the debt bars also the lien which secures it, would seem at first sight to bring the present case within these principles, since the plaintiff is in possession of the land with a title which no one can dispute. But though the statute limiting personal actions bars all remedies, it does not, like the statute applicable to realty, extinguish the right. Under such circumstances the court is right in denying relief till such obligation is discharged. *Booth* v. *Hoskins*, 75 Cal. 271.

RESTRAINT OF TRADE — CONTRACTS TO EMPLOY ONLY UNION MEN — VALIDITY. — The plaintiff prayed an injunction decreeing that his employer should not, in pursuance of a contract with a labor union, discharge him as a non-union man; and that the members of the union should not strike to procure his discharge. *Held*, that the injunction against the employer should be denied, and the injunction against the union modified so as to permit peaceable striking, boycotting, or picketing. *Mills* v. *United States, etc., Co.*, 91 N. Y. Supp. 185.

The plaintiff union sued the defendant under a contract by which the defendant had agreed to employ only union men in good standing. *Held*, that the contract is against public policy and cannot support an action. *Jacobs* v. *Cohen*, 90 N. Y. Supp. 854.

It once seemed that the law of New York on the liability of unions for procuring the discharge of non-union employees by threats of striking was settled in practical accordance with the present rule in England and Massachusetts. *Curren* v. *Galen*, 152 N. Y. 33; *Quinn* v. *Leathem*, 70 L. J. P. C. 76; *Plant* v. *Woods*, 176 Mass. 492. But in 1902 the question was reopened by a strong assertion of the legality of

such action. *National Protective Ass'n* v. *Cumming*, 170 N. Y. 315. The two recent Supreme Court cases, considered together, affirm but limit this latter rule. In the first case the court allows the employer to discharge non-union men according to contract, and permits the other parties to the pact to strike peaceably to procure such discharge. They may adjust matters between themselves. In the second case the court refuses to punish non-compliance with the agreement. If these cases stand as law they place contracts to employ only union members in the category of those agreements whose performance the courts will neither forbid nor assist; and point out another act which, like taking usury and refraining from marriage, is impolitic but not illegal.

RESTRICTIVE AGREEMENTS AS TO USE OF PROPERTY — CHANGE IN CHARACTER OF LOCALITY AS GROUND FOR REFUSING INJUNCTION WHERE DURATION OF COVENANT IS LIMITED. — In an action brought to enjoin the erection of an apartment house upon the defendant's premises in violation of a covenant entered into by a former owner from whom the defendant had bought with notice, the defense was interposed that the character of the neighborhood had so changed as to render an enforcement of the agreement inequitable. The covenant between the original parties had at first been without limitation, but was shortly afterward modified so as to expire in twenty-five years. *Held*, that an injunction will be granted, since the modification of the agreement shows conclusively that the parties intended it to be strictly enforced during the time limited for its operation. *McClure* v. *Leaycraft*, 97 N. Y. App. Div. 518.

Courts of equity will not decree specific performance of agreements restricting the use of land where the character of the locality has so changed as to defeat the purpose of the agreement and to render its enforcement of little benefit to the plaintiff and a great hardship to the defendant *Trustees of Columbia College* v. *Thacher*, 87 N. Y. 311; *Jackson* v. *Stevenson*, 156 Mass. 496. The fundamental question in each case should be, whether under the circumstances the relief sought would be equitable. In determining this question, the fact that the parties have shown or expressed an intention to make the covenant binding regardless of changes in the neighborhood should be merely a circumstance in favor of granting the decree, to be given more or less weight as the suit is between the original parties, or between subsequent purchasers from them. Likewise, the fact that the covenant is limited to a short period of years may make its enforcement less inequitable, but should hardly be conclusive. *Cf. Page* v. *Murray*, 46 N. J. Eq. 325.

SPECIFIC PERFORMANCE — GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF — INSOLVENCY. — The plaintiff sought specific performance of a contract for the sale of cattle, alleging payment of the purchase price and the defendant's insolvency. *Held*, that the bill will not lie. *Hendry* v. *Whidden*, 37 So. Rep. 571 (Fla.). See NOTES, p. 454.

TAXATION — COLLECTION AND ENFORCEMENT — ASSUMPTION OF INVALID TAXES. — The plaintiffs obtained title to certain land by a deed reciting that it was subject to taxes which the purchasers agreed to pay as a part of the consideration. Having subsequently ascertained that the taxes were invalid, the plaintiffs sued for an injunction to restrain the city from collection. *Held*, that the plaintiffs are estopped to deny the validity of the taxes. *Eddy* v. *City of Omaha*, 101 N. W. Rep. 25 (Neb.).

If the city's claim upon its debtor's promisor be recognized as purely derivative and founded upon doctrines analogous to those governing statutory garnishment, it seems difficult to uphold this result, since the creditor's right against his original debtor has failed. In cases of the assumption of mortgages it is frequently said that where the mortgagor was not originally liable to the mortgagee, the latter has no right against the mortgagor's grantee. *Ward* v. *De Oca*, 120 Cal. 102. Yet in a large class of cases the grantee's promise is construed as one not merely to indemnify, but to pay an alleged debt, the possible invalidity of which his grantor has waived. See *Freeman* v. *Auld*, 44 N. Y. 50; *Kennedy* v. *Brown*, 61 Ala. 296. This interpretation seems equally applicable to the case of assumption of invalid taxes. It would seem, however, that it is to be applied with caution, and only where a fair interpretation of the contract of the original parties clearly justifies it. It has been rejected in isolated cases of the assumption of invalid mortgages as well as of invalid taxes. See *Goodman* v. *Randall*, 44 Conn. 321; *State* v. *Mayor of Jersey City*, 35 N. J. Law 381. As to the applicability of principles of estoppel, see 17 HARV. L. REV. 497.

TITLE, OWNERSHIP, AND POSSESSION — THINGS SUBJECT TO OWNERSHIP AS PROPERTY — OYSTERS. — Under a statute, the plaintiff and defendant enjoyed per-

petual franchises of adjoining tracts under the waters of Long Island Sound for purposes of shellfish cultivation. The plaintiff, supposing the defendant's land to be his own, deposited oyster shells upon it so that young oysters in the free-swimming larval stage became attached to the shells and developed into marketable oysters. The defendant having taken these oysters was sued for conversion. *Held*, that the plaintiff can recover, as the property is in him. *Vroom* v. *Tilly*, 91 N. Y. Supp. 51.

Whether property in oysters is governed by the general law of original acquisition and disseisin of chattels or by its special branch relating to wild animals has been a puzzling question. Oysters have been variously regarded as being analogous to: (1) animals *ferae naturae;* (2) inanimate personalty; (3) *ferae naturae* until taken and thereafter inanimate chattels; (4) emblements. See (1) *McCarty* v. *Holman*, 22 Hun (N. Y.) 53; (2) *State* v. *Taylor*, 27 N. J. Law 117; *cf.* (3) *Fleet* v. *Hegeman*, 14 Wend. (N. Y.) 42; (4) *Huffmire* v. *City of Brooklyn*, 22 N. Y. App. Div. 406. This interesting case seems to test the nature of the property right. Whatever the status of adult oysters, the free-swimming form seems more nearly *ferae naturae*, and if such, when taken by a trespasser title would be in the owner of the land or privilege. *Blades* v. *Higgs*, 11 H. L. Cas. 621. Again, though the shells sown remain the plaintiff's personalty, it is difficult to say that the young oysters are the increase of such chattels. But see *Grace* v. *Willets*, 50 N. J. Law 414. If the shells be regarded either as seed or as realty to which the oysters became attached, the defendant's case is even clearer. The analogy to animals *ferae naturae* seems the most helpful, but on whatever reasoning, the court might well have decided for the defendant.

TRANSFER OF STOCK — ATTACHMENT BY CREDITOR WHERE TRANSFER NOT RECORDED — RIGHTS WHERE CREDITOR HAS ACTUAL NOTICE. — A statute provided that no unregistered transfer of stock should be valid against the creditors of the stockholders. *Held*, that an attaching creditor prevails over an unregistered transferee even though he has actual knowledge of the transfer. *Scott* v. *Houpt*, 83 S. W. Rep. 1057 (Ark.).

Under statutes making stock transferable only on the books of the company, the courts have not generally invalidated unrecorded transfers, but have given the assignee at least an equitable interest in the stock. *Kellogg* v. *Stockwell*, 75 Ill. 68. Accordingly, the transferee's interest has been held sufficient to entitle him to sue the directors for misconduct. *Parrott* v. *Byers*, 40 Cal. 614. So too such a transfer is good against the transferrer's assignee in bankruptcy. *Dickinson* v. *Central National Bank*, 129 Mass. 279. And, again, by the great weight of authority and contrary to the principal case, an attaching creditor having notice of the unregistered transfer is not protected. *Bridgewater Iron Co.* v. *Lissberger*, 116 U. S. 8. The latter rule seems correct. The purpose of statutes requiring registration is to prevent fraud by giving notice to all persons dealing with the stock. Under such circumstances actual notice should be treated as equivalent to registration. Furthermore, since the objects of these statutes are largely the same as those of recording acts, the principal case would seem inconsistent with the line of decisions in the same state as to unrecorded deeds, where a purchaser having actual notice is not protected. *Cf. Byers* v. *Engles*, 16 Ark. 543.

TRUSTS — RESULTING TRUSTS — EFFECT OF INDETERMINATE CONTRIBUTION TO PURCHASE PRICE. — Property was bought in the name of a married woman out of a fund arising from the earnings of the husband, the wife, and adult and minor children. The exact proportion contributed by the husband and minor children was not ascertainable. *Held*, that no trust results in favor of the husband. *Onasch* v. *Zinkel*, 72 N. E. Rep. 716 (Ill.).

Almost universally, when several persons contribute proportionate shares to the purchase price of land conveyed to one, a trust results in their favor. It is often stated that the share must be some aliquot portion of the whole amount (*i. e.* one-third, one-fifth, etc.), giving a proportionate aliquot interest in the land. *McGowan* v. *McGowan*, 14 Gray (Mass.) 119. Such seems to be the rule in Illinois. But see *Fleming* v. *McHole*, 47 Ill. 282. A more reasonable rule obtains in most jurisdictions, where any fraction has been allowed; so long as a definite share is found, a trust arises to the extent of the contribution. *Currence* v. *Ward*, 43 W. Va. 367. Almost everywhere the claimant must prove a definite interest and leave no uncertainty as to his share; and a general, indeterminable contribution creates no trust. *Olcott* v. *Bynum*, 17 Wall. (U. S.) 44. Yet, in a few cases, where the shares were undefined, they were presumed to be equal. *Edwards* v. *Edwards*, 39 Pa. St. 369. Even if the amounts had been ascertainable in the present case, no other result should have been reached, since, as between husband and wife, the doctrine does not apply, and the legal conveyance to the wife is deemed an advancement unless there be satisfactory evidence of a contrary intention. See *Adlard* v. *Adlard*, 65 Ill. 212.

WILLS — EXECUTION — ATTESTING WITNESSES: HUSBAND OR WIFE OF LEGATEE AS WITNESS. — This action was brought by the heir at law to contest a will on the ground that the husband of one of the legatees was a subscribing witness thereto. *Held*, that such relationship does not disqualify the husband from being a subscribing witness. *Lanning* v. *Gay*, 78 Pac. Rep. 810 (Kan.).

Where a devise or bequest is made to either husband or wife of an attesting witness, by the decided weight of authority such witness is thereby disqualified. *Sullivan* v. *Sullivan*, 106 Mass. 474. In arriving at this conclusion courts are guided by the consideration that such witnesses are incompetent on account of personal interest, and that a husband and wife cannot ordinarily testify for or against each other. In some jurisdictions, however, where bequests to subscribing witnesses are void by statute, a strained interpretation makes a bequest to the husband or wife of such a witness invalid, thus rendering the witness competent by removing the objectionable element of interest. *Jackson, ex dem. Beach* v. *Durland*, 2 Johns. Cas. (N. Y.) 313. In a few jurisdictions where a husband and wife are permitted by statute to testify for or against each other, the interest of either party in a bequest to the other is considered too remote to disqualify him or her as an attesting witness. *Lippincott* v. *Wikoff*, 54 N. J. Eq. 107. The principal case, which apparently holds the whole will valid, seems to have gone farther than any previous one in arriving at this result without statutory aid.

BOOKS AND PERIODICALS.

I. LEADING LEGAL ARTICLES.

WAR RISKS IN MARINE INSURANCE. — This subject, which since the breaking out of the Russo-Japanese war has naturally been of special interest, is considered in a recent article by a French writer. *De quelques questions relatives à l'assurance des risques de guerre*, by Emile Audouin, 31 J. du Droit Internat. Privé 1025 (Nos. XI.–XII., 1904). It was formerly the practice, he says, for the same policy to cover both ordinary perils of the sea and war risks, for a single premium. But gradually a change was made, until in 1900 the principal marine insurance companies operating in Europe adopted the principle of a special policy for each kind of risk.

The change makes necessary an exactness in the legal definition of ordinary and war risks not required before. If the insured has to cover the two in different companies, it is important for him to see that there are no gaps to leave him without protection, as will happen if the war risk contract is held not to cover a loss, which the law governing the ordinary risk contract would not consider the result of an ordinary peril. If he can sue on both policies in the same country, there is little danger that the decisions will not supplement each other. But one who insures in France against ordinary perils and in England against war risks, may find the difference between English and Continental jurisprudence a grave matter. England determines whether a loss is caused by war by what seems to the Continental mind a very narrow principle, that of proximate cause. An example is the holding that the insurers against ordinary risks are liable for the loss of a vessel which went ashore because the Confederates had extinguished the light on Cape Hatteras. The immediate cause of the loss was the striking on the reef, not the act of war. And in the Spanish-American war the United States vessel Columbia, cruising at night without lights in conformity with orders, struck and sank a British vessel. The French court held the war risk insurer responsible, but Douglas Owen, an English authority, declares an English court would have held differently, for the war had nothing directly to do with the loss; a war vessel without lights might have done the same damage in manœuvers in time of peace. M. Audouin summarizes the English view as holding the risk an ordinary one, unless there is a direct act of hostility against the object insured. The more liberal Continental view is that if it can reasonably be said that the loss would not have happened except for the war, the war